Supreme Court, U.S.
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No. 02-672

In The Supreme Court of the United States

RABBI LUZER WEISS,

Petitioner,

v.

COMMACK SELF-SERVICE KOSHER MEATS, INC. d/b/a COMMACK KOSHER, BRIAN YARMEISCH, JEFFREY YARMEISCH, HON. SHELDON SILVER, ABE ALPER, JON GREENFIELD, JACK LEE, RABBI MOSHE PORTNOY, RICHARD SCHWARTZ, AGUDATH HARABONIM OF THE UNITED STATES AND CANADA, AGUDATH ISRAEL OF AMERICA, NATIONAL COUNCIL OF YOUNG ISRAEL, RABBINICAL ALLIANCE OF AMERICA, RABBINICAL COUNCIL OF AMERICA, TORAH UMESORAH-NATIONAL SOCIETY OF HEBREW DAY SCHOOLS and UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Respondent Commack Self-Service Kosher Meats, Inc. d/b/a Commack Kosher, has no parent or subsidiary corporations and no public corporation holds any of said Respondents' stock.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents Commack Self-Service Kosher Meats, Inc., d/b/a Commack Kosher, Brian Yarmeisch and Jeffrey Yarmeisch, by their counsel Robert Jay Dinerstein, Esq., hereby respectfully respond to the petition of Rabbi Luzer Weiss, as Director of the Kosher Enforcement Bureau of the Department of Agriculture & Markets of the State of New York (the "State"), to review the decision of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The State brings on this Petition for a Writ of Certiorari in an attempt to reverse the opinion of the United States Court of Appeals for the Second Circuit, reported at 294 F.3d 415 (2d Cir. 2002), a copy of which is set forth in Appendix A to the State's Petition; an opinion which affirms the decision of the United States District Court for the Eastern District of New York. *Commack Self-Service Meats v. Rubin*, 106 F.Supp. 2d 445, a copy of which is set forth at Appendix B to the State's Petition.

COUNTER STATEMENT OF THE CASE

The underpinning of this case is the unconstitutionality of §201-a, §201-b, §201-c, §201-e, §201-f, §201-h and §26-a of the New York State Agriculture & Markets Law [hereinafter the "Statute"]. The Statute purports to prevent or punish fraud in the sale of *kosher* food products.

While over the years the term *kosher* has been incorporated into the vernacular, *kosher*, in the context of the Statute, speaks the dogma of Judaism. The Petitioner and the Petitioners in the companion Petition[1] have conceded that, even within the orthodox Jewish community, there is no unanimity in the interpretation of the Jewish laws governing what is *kosher*. The result is that "to assert that a food article does not conform to kosher requirements, New York must take an official position as to what are the *kosher* requirements. In doing so, the Department [State] must either interpret religious doctrine or defer to the interpretations of religious officials in reaching its official position." *Commack Self-Service Kosher Meats, Inc. v. Weiss,* 294 F.3d 415, 427 (2d Cir. 2002)

The Respondents concur with, and adopt, the findings of the Courts below both as to the facts and the legal analysis and incorporate same herein by reference. It is also of consequence that it is undenied that the Jewish laws, which the Statue attempts to regulate, are found in the *Torah,* the first five books of the Jewish scriptures, and in the *Schulchan Aruch*, the Code of Jewish Law. The unconstitutionality of the Statute is underscored by the

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[1] Sheldon Silver, Abe Alper, Jon Greenfield, Jack Lee, Rabbi Moshe Portnoy, Richard Schwartz, Agudath Harabonim of the United States and Canada, Agudath Israel of America, National Council of Young Israel, Rabbinical Alliance of America, Rabbinical Council of America, Torah Umesorah-National Society of Hebrew Day Schools and Union of Orthodox Jewish Congregations of America, *Petitioners*, v. Commack Self-Service Kosher Meats, Inc. d/b/a Commack Kosher, Brian Yarmeisch, and Jeffrey Yarmeisch, *Plaintiffs-Respondents*, and Rabbi Luzer Weiss, as Director of the Kosher Law Enforcement Division of the New York State Department of Agriculture and Markets, *Defendants-Respondents*.

fact that the *Torah* and the *Schulchan Aruch* are written in Hebrew and Aramaic. While the *Torah* has been translated into English,[2] the *Yoreah Deah*, the relevant portion of the *Schulchan Aruch* dealing with the laws of what is *kosher*, has not been translated into English. There are commentaries on the *Yoreah Deah* in English, however, as a predicate to enforcing the Statute the State would have to determine which commentary was sufficiently authoritative to justify the State's reliance thereon. Of course, such approach ignores the fundamental truth that the *Yoreah Deah* contains lengthy debates by Rabbis who try to interpret the laws and who are not always in agreement. Since, in the Jewish religion, there is no one equivalent to the Pope, *Pirkei Avot*, a compendium by Jewish sages of *Talmudic* legal rulings and *Halachic* axioms relating to the Jewish view on the sanctity of life and the ethical and moral principles guiding the Jewish way of life, mandates that one "get yourself a Rabbi." In Judaism it is the Rabbi an individual selects who is the final authority for that person with respect to matters of Jewish law and practice. In support of such concept, Jewish law mandates that once a question has been posed about Jewish observance to a Rabbi and the Rabbi has rendered a decision, the question cannot be posed to another Rabbi. No Rabbi outranks another and, therefore, the observance of Judaism varies from Rabbi to Rabbi and community to community.

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[2] It should be noted that there are differences in the translation between various publications representing themselves to be English translations of the *Torah*. The orthodox Jews, as a rule, rely on the original Hebrew and refer to their Rabbis as to any ambiguity.

Just as the Protestant faith is comprised of many denominations, running the gamut from the Evangelical and Pentecostal sects to the Unitarian Universalist churches, in Judaism there are, *inter alia*, Hasidic sects, Orthodox Jews, Modern Orthodox Jews, Union for Traditional Judaism, Conservative Jews, Reform Jews and Reconstructionist Jews. It was undenied in the proceedings below that the orthodox Jewish community has publicly proclaimed that non-orthodox denominations of Judaism are not legitimate sects of Judaism. The State of New York has been deferential to orthodox Judaism by attempting to enforce the Statute without regard to the fact that, in addition to the lack of unanimity of opinion, even amongst orthodox Jews, as to the Jewish *kosher* laws, non-orthodox denominations of Judaism have a different perspective on the Jewish *kosher* laws.

As the Second Circuit found:

> [T]here is considerable disagreement over what precepts or tenets truly represent the laws of kashrut. There are differences of opinion concerning the application and interpretation of the laws of kashrut both within Orthodox Judaism and between Orthodox Judaism and other branches of Judaism. *Ran-Dav's County Kosher v. New Jersey,* 129 N.J. 141, 147, 608 A.2d 1353 (1992) (citing Herman Wouk, *This Is My God* (1959), reprinted in *The Life of Torah* 98-99 (Jacob Neusner ed. 1974); Rabbi Hayim Halevy Donin, *To Be a Jew* 102-04, 112-19 (1972); Rabbi J. David Bleich, *Contemporary Halakic Problems* 84-92 (1977)). For example, Orthodox Jews of the Sephardic sect adhere to "glatt" kosher standards that are more stringent than those followed by other Orthodox Jews. Raphael Poliakoff, *What Is Glatt Kosher?*, Kashrus Newsletter, vol. 1, no. 5.

> As between different branches of Judaism, "Conservative and Orthodox rabbis differ sharply on many . . . issues" such as the kosher status of wine, cheese, sturgeon, and swordfish. Mark A. Berman, *Kosher Fraud Statutes and the Establishment Clause: Are They Kosher?*, 26 Col. J.L. & Soc. Probls. 1, 8 (1992). It is also widely recognized that "the strain between all three denominations [Orthodox, Conservative, and Reform] has increased in recent years." *Id.*
>
> We find it indisputable that there are differences of opinion within Judaism regarding the dietary requirements of *kashrut*. As a result, because the challenged laws interpret "kosher" as synonymous with the views of one branch, those of Orthodox Judaism, the State has effectively aligned itself with one side of an internal debate within Judaism. *Commack*, 294 F.3d 415.

The State's adoption of "orthodox Hebrew religious requirements" as the criteria is analogous to the State of New York declaring that, since Catholicism was the first denomination of Christianity, if another denomination of Christianity offered its members Communion, they could only use a Eucharist and wine approved by the Roman Catholic Church; otherwise, the Communion was illegitimate and perpetrated a fraud. Similarly, are the Orthodox Christian sects (Russian, Armenian, Greek, etc.) perpetrating a fraud on their adherents because they do not celebrate Christmas and Easter when Catholicism and the other Christian faiths observe same.

The unavoidable conclusion is that in the State's attempt to regulate what is or is not *kosher*, "the State has effectively aligned itself with one side of an internal

debate with Judaism," *Id.* 426 and excessively entangled the State in religion.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT PRESENT A CONFLICT

The decision of the United States Court of Appeals for the Second Circuit finding the challenged statute to be unconstitutional is correct and does not conflict with the decision of any Federal Court of Appeals or with any decision of this Court.

This Court denied a Petition for Certiorari in the matter of *Ran-Dav's County Kosher, Inc. v. New Jersey*, 507 U.S. 952 (1993), which, *inter alia*, raised the essentially identical issue.

Petitioner's reliance upon this Court's decision in *Hygrade Provision Co. v. Sherman,* 266 U.S. 497 (1925) to argue that a conflict exists is misplaced. The Petitioner neglects to acknowledge that the *Hygrade* case involved the Due Process Clause rather than the Establishment Clause. As the Petitioner should have recognized, it was not until some twenty (20) years after the Court rendered the *Hygrade* decision that the Fourteenth Amendment was held applicable to the states. *See Everson v. Board of Education,* 330 U.S. 1, 15, 16 (1947).

> Like the Establishment Clause generally, the prohibition on excessive government entanglement with religion "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *Illinois ex*

> *rel. McCollum v. Bd. Of Educ.*, 333 U.S. 203, 212, 68 S.Ct. 461, 92 L.Ed. 649 (1948).
>
> It appears to us that the challenged laws excessively entangle government and religion because they (1) take sides in a religious matter, effectively discriminating in favor of the orthodox Hebrew view of dietary requirements; (2) require the State to take an official position on religious doctrine; and (3) create an impermissible fusion of governmental and religious functions by delegating civic authority to individuals apparently chosen according to religious criteria.
>
> The Department argues that the challenged laws do not excessively entangle the government with religion because "no one disputes the meaning of the term 'kosher.'" There is ample evidence in the record to support the opposite conclusion. *Commack*, 294 F.3d 426-428

Furthermore, in *Hygrade* this Court qualified its finding by stating that the meaning of *kosher* was well enough defined "at least as a general thing." In the over eight decades which have elapsed since the *Hygrade* decision was rendered, the world has changed. Sixty or seventy years ago when someone spoke of "grass" there was no confusion – the reference was to the plant that grew on lawns and on which cattle and other animals fed. Today, "grass" is widely recognized as synonymous with "marijuana." Similarly, in the not so distant past the word "gay" described a cheerful, lighthearted excitement or, especially in matters of color, bright or lively. Currently, it is synonymous with a sexual orientation.

The irony is that the Petitioner's fundamental premise is fatally flawed. Throughout the State of New York products are freely sold as *kosher* which bear the symbol

"k" or which bear the trade style of *kosher* supervisory agencies which the orthodox Jewish community finds to be of questionable reliability.[3] While the products may be sufficiently *kosher* for non-orthodox denominations of Judaism, a product which is merely *kosher* is not adequately *kosher* for many, if not most, orthodox Jews.

The term *kosher,* like "grass" and "gay" and innumerable other words, has also gone through a metamorphosis. The post-World War II influx of Jewish immigrants resulted in the introduction to the United States of customs and traditions in the observance of the *kosher* laws which the immigrants had observed in their homelands. It created even greater diversity in the meaning of what was *kosher*. As the record before the Second Circuit conclusively demonstrated, today something which is merely *kosher* is unacceptable to many, if not most, of the orthodox Jewish community. Today the majority of the orthodox Jewish community only finds meat and poultry that is *glatt kosher*, *kosher LeMahadrin* or supervised by a limited number of supervising agencies to be acceptable.

In the final analysis the State, in bringing on this petition, is challenging the legitimacy of non-orthodox denominations of Judaism and, the State's rhetoric notwithstanding, would deny non-orthodox Jewish purveyors from selling fresh meat and poultry, groceries and prepared foods as *kosher* despite the fact that duly ordained Rabbis find same to be acceptably "*kosher.*" The State is

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[3] The members of the orthodox Jewish community will generally rely on their Rabbis to identify the supervisory organizations which their Rabbi deems to be acceptable.

prepared to deny non-orthodox denominations of Judaism the inalienable right to practice their bona fide religion merely because the orthodox Jewish community disagrees with the tenets of the non-orthodox denominations.

II. THE PETITIONER OFFERS NO REASON FOR THIS COURT TO RECONSIDER ITS ESTABLISHMENT CLAUSE JURISDICTION

At issue in this case is New York State's enactment and enforcement of the Statute which requires the State's intervention into an ancient and continual doctrinal debate over Judaism's *kosher* laws. This case does not involve the complex issues of neutral, non-sectarian, state accommodation of all religious beliefs and, therefore, whatever disagreement there might be amongst the members of the Court with respect to the *Lemon* test, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Establishment Clause principles necessary to resolve these issues are not in flux.

This Court has unambiguously declared that secular Courts may not evaluate the conformity of a church's members to the tenets of the faith, may not substitute their judgment for that of religious entities, may not take jurisdiction over religious disputes between the church and its clergy or its members, and must accept as binding the decisions of ecclesiastical bodies with respect to issues of church discipline or governance. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713-18 (1976)

When the "fundamental question of who will preach from the pulpit of a church, and who will occupy the church parsonage" is at issue, "[t]he bare statement of the

question should make obvious the lack of jurisdiction of a civil court. The answer to that question must come from the church." *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 492 (5th Cir. 1974).

While the case at bar does not involve who will preach from the pulpit, it does involve the legitimacy of non-orthodox denominations of Judaism. If a duly ordained, albeit non-orthodox, Rabbi determines that something is *kosher* in accordance with the tenets of the Rabbi's denomination of Judaism, neither the State nor any Court should be empowered to challenge that Rabbi's decision.

Laws that "grant[] a denominational preference," such as the *kosher* regulations at issue here, are subject to "strict scrutiny" even when the state's interest is the important one of protecting citizens from fraud. *Larson v. Valente,* 456 U.S. 228, 246-47 (1982). Attempts by the State to enforce a commercial code that is predicated upon orthodox Hebrew religious requirements raise a "substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs." *Serbian Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 709 (1976). *See also Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 448 (1969).

The State's enforcement of the Statute "enmesh[es]" religious leaders "in the exercise of substantial government powers contrary to this Court's consistent interpretation of the Establishment Clause; 'the objective is to prevent, as far as possible, the intrusion of either Church or State into the precincts of the other.'" *Larkin v. Grendel's Den*, 459 U.S. 116, 126 (1982). Although "[s]ome limited and incidental entanglement between church and

state is inevitable in a complex modern society," *id.* at 126, such "direct cooperation between state officials and religious ministers" is flatly forbidden by the First Amendment, *McGowan v. Maryland*, 366 U.S. 420, 452 (1961), which prohibits a State from employing religious authorities as an adjunct of the civil law enforcement regime "to perform the function of interpreting and applying state standards." *Presbyterian Church*, 393 U.S. at 451. The constitutional vice is compounded by the fact that New York's courts, in the course of enforcing the regulations and deciding which religious authority's understanding of *kashrut* is truly orthodox, would inevitably become embroiled in deciding ecclesiastical questions that are wholly inappropriate for resolution by civil authorities. *See, e.g., Presbyterian Church,* 393 U.S. at 440; *Serbian Orthodox*, 426 U.S. at 709.

The *kosher* regulations are also beyond the constitutional pale because the intermingling of state power and religious doctrine created "the danger of political fragmentation and divisiveness on religious lines." *Grendel's Den*, 459 U.S. at 127.

The Second Circuit found that:

> "to assert that a food article does not conform to kosher requirements, New York must take an official position as to what are the kosher requirements. In doing so, the [State] must either interpret religious doctrine or defer to the interpretations of religious officials in reaching its official position." *Commack Self-Service Kosher Meats, Inc. v. Rabbi Luzer Weiss*, 294 F.3d 415, 427.

The Second Circuit also found the Petitioner's contention that there was a complete absence of Kosher Advisory

Board[4] involvement in enforcement activities to be less than wholly accurate. *Commack*, 294 F.3d 429.

Judge Miner, writing for the Circuit Court, put it as follows:

> Although members of the Board do not directly participate in enforcement activities such as the actual inspection of kosher food establishments, issuance of citations, or pursuit of court action against alleged violators, we decline to take such a narrow view of the Board's involvement with enforcement of the challenged laws. To conclude otherwise, would be to exalt form over substance in light of the broad powers granted to the Board that substantially affect enforcement of he challenged laws.
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> [*3*] While we acknowledge that "some limited and incidental entanglement between church and state authority is inevitable in a complex modern society," *Larkin*, 459 U.S. at 123, 103 S.Ct. 505, "[w]here 'fusion' [of governmental and religious authority] is an issue, the difference lies in the distinction between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority." [*Board of Ed. Of Kiryas Joel v. Grumet*, 512 U.S. [687] at 699, 114 S.Ct. 2481. In our case, the Board's purpose – to advise the Department regarding the requirements of Orthodox Jewish dietary laws – and the fact that, of the six Rabbis on the Board,

[4] New York State Agriculture and Markets Law §26-a

> all are Orthodox, convince us that New York's delegation of authority to the Board was made on the basis of religion and not "on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority." *Id.* at 699, 114 S.Ct. 2481.
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> We find it insignificant that *section 26-a* does not require that Board members be Rabbis or even Orthodox Jews. Instead, we agree with the Fourth Circuit that even if membership [o]n the [Advisory Board] were not restricted to adherents of Orthodox Judaism, or even if there were no [Advisory Board] at all, [the laws'] adoption of the Orthodox rules inevitably requires the intimate involvement of members of that faith, and the leaders of that faith, in discerning the applicable standard. *Barghout v. Bureau of Kosher Meat & Food Control,* 66 F.3d 1337, 1343-44 (4th Cir. 1995); *Commack,* 294 F.3d 429.

It is also disingenuous for the State to argue that the Second Circuit relied on one example of enforcement to conclude that the challenged statues [the Statute] necessarily require the State to interpret religious doctrine. The State is well aware that the record below cites numerous violations of the Respondents' constitutional rights by the State. At his deposition the then serving Director of the Kosher Enforcement Division insisted that certain lamb tongues were unkosher despite his admission that he was aware that the Respondents' supervising Rabbi had ruled that the tongues in issue were acceptably *kosher*.[5] That

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[5] The Yarmeisches' demand for a bill of particulars [in the lamb tongue case] merely made more obvious a fact that would have been true even without the demand for a bill of particulars. The State

(Continued on following page)

was one of many instances which belie the State's contention that intent is a predicate to the finding of a violation.

The Respondents are not the only victim of the State's violation of their religious freedom as the Petitioner would have this Court believe. In *National Foods, Inc. v. Rubin*, 727 F.Supp. 104, 109, the District Court observed that "Hebrew National seems to argue that since it engages Rabbis to supervise all of its meat processing and since on June 19, 1985 a supervising Rabbi certified that its meat was *kosher*, that certification is conclusive evidence of compliance with the statute."

Another case in point involves Brach's, a *kosher* market operated under orthodox Jewish supervision. Brach's was cited for selling unkosher tongues; the State claimed that Brach's had failed to devein the tongues as required. Since Brach's orthodox supervision found the tongues in issue to be *kosher*, Brach's argued that it was undeniable that in finding a violation of the Statute the State was interpreting Jewish rabbinical law in violation

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authorities could not make a determination that the Yarmeisches' meat did not conform to *kosher* requirements without first having arrived at an official position on what the *kosher* requirements are. To do so excessively entangles the State with religion. *See Presbyterian Church*, 393 U.S. at 451-52, 89 S.Ct. 601. We also find that the challenged laws fail the excessive entanglement inquiry because they run afoul of "the core rationale underlying the Establishment Clause[, which] is preventing 'a fusion of governmental and religious functions.'" *Larkin*, 459 U.S. at 126, 103 S.Ct. 505 (quoting *School District of Abington Township v. Schempp*, 374 U.S. 203, 222, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963)). This prohibition is violated not only by the requirement that the State adopt an official position on a matter of religious doctrine, but also by the existence and activities of the Advisory Board. *Commack*, 294 F.3d 415.

of the Establishment Clause. The State did not hesitate to pit its interpretation of Jewish dogma against that of Brach's duly ordained supervising orthodox Rabbi, *Brach's Meat Market v. Abrams*, 668 F.Supp. 275, 278 (S.D.N.Y. 1987).[6]

The result is that there is extensive entanglement to a primarily religious effect and there are no circumstances under which the Statute could pass constitutional scrutiny.

III. THE CIRCUIT COURT'S DECISION CONFORMS WITH THIS COURT'S PRECEDENTS FOR ADJUDICATION OF FACIAL CHALLENGES AND FINDS A GOVERNMENT ENDORSEMENT OF RELIGION IN VIOLATION OF THE ESTABLISHMENT CLAUSE

The Petitioner argues at length that the Second Circuit's decision conflicts with the Court's precedent governing facial challenges.

The Court below unambiguously articulated its basis for rejecting the Petitioner's argument:

> As the Supreme Court has recently reiterated, in "cases involving facial challenges on Establishment Clause grounds, . . . we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)." *Santa Fe Ind.*

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[6] In fact, the District Court found that the question of whether *kosher* meat must be deveined apparently remains an open issue in the Jewish religion. *Id.* 278 FN 4.

Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000) (internal quotation marks and citations omitted). The *Lemon* factors require that a challenged law (1) have a valid secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive state entanglement with religion. 403 U.S. at 612-13. We treat the excessive entanglement prong as a part of our "inquiry into a statute's effect." *Agostini v. Felton*, 521 U.S. 203, 233 (1997). We find the challenged laws do not pass constitutional muster under the *Lemon* test because they have a primary effect that both advances and inhibits religion.[7] *Commack*, 294 F.3d, 425

FN7: Plaintiffs contend we should judge the constitutionality of these laws under the standard of strict scrutiny, as in *Larson v. Valente*, 456 U.S. 228, 246 (1982), and defendants claim that, because this is a facial attack, we should apply the rule of *United States v. Salerno*, 481 U.S. 739, 745 (1987), requiring the Plaintiff to show that "no set of circumstances exists under which the (statute) would be valid." We need not answer either question because we conclude for the reasons given that, as to both questions, the laws fail the test of constitutionality even using the assumptions that are most accommodating to the State.

Petitioner attempts to bolster its specious position by arguing that in matters of ***kashruth*** [the practice of being kosher] all Jews start with the "orthodox Hebrew religious requirement" as their common point of reference. In the

footnote, n.6, the State represents that "Had those provisions required the State to favor orthodox Judaism over Conservative Judaism, the United Synagogue of America presumably would have opposed the legislation. While the Respondents do not know the circumstances surrounding the enactment of the Statute, apparently the Petitioner has forgotten that the United Synagogue of Conservative Judaism, the parent body for Conservative Jewish congregations, joined in an *amicus* brief to the Second Circuit in support of Respondents.

IV. THE CHALLENGED STATUTE CONSTITUTES A GOVERNMENT ENDORSEMENT OF RELIGION IN VIOLATION OF THE ESTABLISHMENT CLAUSE

It defies credibility that the Petitioner criticizes the Second Circuit for failing to adopt the "reasonable observer's" viewpoint as to whether or not the challenged statute favors orthodox Judaism over other denominations of Judaism. It is undenied that virtually each of the intervening organizations has publicly declared that non-orthodox denominations of Judaism are illegitimate and/or unauthentic. It appears to be that, consistent with the position of the Intervenors and their fellow members of the orthodox Jewish community, an acknowledged powerful voting block, the State has historically taken the position that, in the context of the challenged statute, *kosher* is synonymous with "orthodox Hebrew religious requirements."

Judge Gershon found that, as the Respondents contend, the settled interpretation of the challenged statute is that "*kosher*" means "in accordance with orthodox Hebrew religious requirements"; a conclusion she finds confirmed

by the brief of Robert Abrams, as Attorney General of the State of New York, in *Ran-Dav's County Kosher, Inc. v. State*, 129 N.J. 141, 608 A.2d 1353 (1992), *cert. denied*, 507 U.S. 952 (1993); *Commack*, 106 F.Supp. 2d 4, 450. The numerous judicial decisions holding that the Statute defines "*kosher*" as synonymous with "orthodox Hebrew religious requirements," collaterally estop the State from now arguing otherwise.

To enforce the Statute enmesh[es] religious leaders in the exercise of substantial government powers contrary to this court's consistent interpretation of the Establishment Clause; "the objective is to prevent, as far as possible, the intrusion of either Church or State into the precincts of the other." *Larkin v. Grendel's Den*, 459 U.S. 116, 126 (1982). "Some limited and incidental entanglement between church and state is inevitable in a complex modern society." *Id.* at 23. The Statute's adoption of orthodox Hebrew religious requirements as the criteria is neither "limited" nor "incidental," "'fusion of governmental and religious functions'" in the area of religious dietary doctrine. *Id.* at 126. Such "direct cooperation between state officials and religious ministers" is flatly forbidden by the First Amendment, *McGowan v. Maryland*, 366 U.S. 420, 452 (1961), which prohibits a State from employing religious authorities as an adjunct of the civil law enforcement regime "to perform the function of interpreting and applying state standards." *Presbyterian Church*, 393 U.S. at 451. The constitutional vice is compounded by the fact that the State, to enforce the regulations, must decide which religious authority's interpretation of Judaism's dietary laws is truly orthodox. In doing so the State must inevitably become embroiled in deciding ecclesiastical questions that are wholly inappropriate for resolution by

civil authorities. *See, e.g., Presbyterian Church*, 393 U.S. at 440; *Serbian Orthodox*, 426 U.S. at 709.

The *kosher* regulations are also violative of the Establishment Clause because the intermingling of state power and religious doctrine creates "the danger of political fragmentation and divisiveness on religious lines." *Grendel's Den*, 459 U.S. at 127. The record in this case conclusively establishes that the State's enforcement of the Statute provoked precisely the sort of turmoil identified by this Court in *Grendel's Den*. In that case, where the Court struck down a law delegating a role in liquor licensing to local churches, this Court noted the risk that this power could be "employed for specifically religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith." 459 U.S. at 125. In New York, the abuse was manifested by the State's targeting of purveyors of *kosher* food which was not under orthodox Jewish supervision.

In *Lee v. Weisman*, 112 S.Ct. 2649 (1992), this Court reasserted the proposition that the state must not insinuate itself into sectarian "religious debate," because "[a] state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Id.* at 2657, 2658 (Kennedy, J., for the Court). "Government may neither promote nor affiliate itself with any religious doctrine or organization, nor may it obtrude itself in the internal affairs of any religious institution." *Id.* at 2661-62 (Blackman, J., joined by Stevens and O'Connor, JJ., concurring). This reflects the "Madisonian concern that secular and religious authorities must not interfere with each other's respective spheres of choice and influence." *Id.* at 2663 n.3 (Blackmun, J., joined by Stevens and O'Connor, JJ.,

concurring). By allowing the state courts to arbitrate between competing understandings of just what is *kosher* under Jewish law, the State "invite[s] the courts to engage in comparative theology. I can hardly imagine a subject less amenable to the competence of the . . . judiciary, or more deliberately to be avoided where possible." *Id.* at 2671 (Souter, J., joined by Stevens and O'Connor, JJ., concurring).

In *Weisman* even the dissenters agreed that the Establishment Clause "ruled out of order government-sponsored endorsement of religion – even when no legal coercion is present . . . – where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world, are known to differ." *Id.* at 2683-84 (Scalia, J., joined by Rehnquist, C.J., and White and Thomas, JJ., dissenting). The state may not "lend its power to one or the other side in controversies over religious authority or dogma." *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872, 877 (1990) (Scalia, J., for the Court). That is precisely what the State has done and now tries to justify.

Thus, the nuances of the *Lemon* test and the controversy surrounding them are simply not implicated by the decision below. The outcome was dictated by Establishment Clause principles – on which this Court is unanimous – that forbid state involvement in sectarian religious debates and the use of coercive state power to promote religious doctrine. The decision below presents no occasion to choose between the *Lemon* test and any alternative "coercion" theory of the Establishment Clause.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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